Filed 10/5/04 In re Emma M. CA1/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re EMMA M. et al., Persons Coming Under the Juvenile Court Law.	
CONTRA COSTA COUNTY BUREAU OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. JESSICA W., Defendant and Appellant.	A105091 (Contra Costa County Super. Ct. Nos. J03-01743 & J03-01744)

In this juvenile dependency case, the mother of two children with different fathers appeals from the trial court's dispositional orders, contending that there was insufficient evidence to support the children's removal from her custody, and that adequate notice of the proceedings was not given under the Indian Child Welfare Act (ICWA). She also contests certain aspects of the reunification plan ordered by the trial court.

We conclude that there was substantial evidence to support the dispositional orders, and that for procedural reasons, we need not address the mother's challenges to the reunification plan. We also hold that any failure to comply fully with the ICWA was harmless as to the older child, because she was placed in the custody of her father, who was the primary source of her Indian heritage. We reverse as to the younger child,

however, because he was removed from both his parents, and the ICWA notice given as to him was not sufficient to comply with the requirements of federal law.

I. FACTS AND PROCEDURAL BACKGROUND

Appellant Jessica W.[1] has two children who are the subject of this dependency proceeding: Emma M., born in August 2001, and Conner D., born in July 2003. Emma's father is Richard M., and Conner's father is Nicholas (Nick) D. Both fathers participated in the trial court proceedings, but neither is a party to this appeal.

At the time these dependency proceedings were initiated, in September 2003,[2] Richard and Jessica were living separately, and sharing custody of two-year-old Emma. Jessica, Nick, and two-month-old Conner were living as one household. Jessica was employed and Nick was not, so Nick sometimes cared for both children while Jessica worked.

A. Dependency Proceedings

On September 13, after Emma had been with Jessica and Nick for about three days, Jessica brought Emma to Richard at Richard's parents' home. Sometime thereafter, either Richard or his mother noticed bruises on Emma's buttocks, and Emma told Richard that Jessica or Nick had spanked her. On September 14, Richard took Emma to the emergency room, where she was examined by a doctor who concluded that her bruises, which were extensive in size and between one and four days old, were almost certainly the result of her having been severely spanked or hit with a blunt instrument. As a result of the doctor's examination, the matter was reported to respondent Contra Costa County Bureau of Children And Family Services ("Bureau").

The Bureau took custody of both children on September 17, filed petitions initiating dependency proceedings on September 18, and obtained detention orders on

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[1] We use first names for all of the family members involved in this proceeding, not out of disrespect, but in order to maintain confidentiality.

[2] All further unspecified references to dates are to the year 2003.

September 23.[3] The petition for Emma alleged that Emma had suffered serious physical harm inflicted by a parent or guardian. (Welf. & Inst. Code, § 300, subd. (a).[4]) The petitions for both Emma and Conner alleged that Jessica had failed to protect them, in that both Jessica and Nick used marijuana regularly, and Jessica's substance abuse impaired her ability to parent. (§ 300, subd. (b).) Conner was found to be healthy, well nourished, and clean, and had received appropriate medical care. Accordingly, the petition for Conner did not allege that he was being abused, but only that he was at risk due to the abuse of Emma. (§ 300, subd. (j).)

The petitions were amended on October 3. The amended petitions alleged that while in Jessica's custody, Emma had sustained bruising to her buttocks that would not have occurred but for Jessica's unreasonable or neglectful acts or omissions (§ 300, subds. (a), (b)), and that Conner was at risk of abuse by reason of this abuse of his half-sibling (§ 300, subd. (j)). The amended petitions also alleged that Jessica had admitted to using marijuana regularly, that she had a history of substance abuse that impaired her ability to parent both children, and that she had left the children in Nick's care knowing that Nick used marijuana while caring for them. (§ 300, subd. (b).) As to Conner only, the amended petition alleged that his father (Nick) had a substance abuse problem that impaired his ability to care for him. (§ 300, subd. (b).)

A contested jurisdictional hearing was held on October 15 and 16. At the conclusion of the hearing, the court found true the amended allegations regarding the bruises on Emma's buttocks and Jessica's marijuana use, and also, as to Conner, the allegation regarding Nick's substance abuse problem. However, the court dismissed the allegations that Jessica failed to protect the children by leaving them in Nick's care while Nick was using marijuana. The court ordered the detention orders to remain in effect pending the dispositional hearing. Emma remained with her father in the home of her

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[3] Emma was detained as to Jessica only, and placed with Richard.

[4] All further unspecified statutory references are to the Welfare and Institutions Code.

paternal grandparents, and Conner was placed with his paternal grandparents (Nick's parents).

The dispositional hearing was held on December 18. The disposition report that the Bureau prepared in late October (the October report), and an update prepared on December 11, identified various shortcomings in Jessica's and Nick's cooperation with the Bureau during the time period since the jurisdictional hearing, including positive drug tests for marijuana, and failure to complete drug treatment, substance abuse, and anger management programs.[5] The October report opined that the children were not safe in Jessica and Nick's care at the time due to their continuing positive drug tests. Richard, however, was characterized as "genuinely trying to be a parent" to Emma, and as having shown by his actions that he was responsible.

In response to the issues identified by the October report and the update, Jessica offered evidence at the hearing that she had completed her parenting classes, that she had recently enrolled in anger management and substance abuse treatment programs, and that she had had several negative drug tests. This was undercut by evidence that she had submitted a diluted sample on October 6, and tested positive for marijuana, at a fairly high level, on December 10. Jessica also pointed out that the Bureau had not provided her with a referral to an individual therapist until December 16, even though the social worker's correspondence with her indicated an intent to refer her to such counseling in early November. She also presented evidence that she had behaved appropriately during her visits with Emma and Conner, though she had missed one visit and had been late at least once.

Nick's counsel represented to the court that he had started an anger management program and a substance abuse program, had completed his parenting education program,

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[5] Apparently, Jessica and Nick signed up for a domestic violence treatment program in early November, but failed to attend any of the sessions. In early December, they scheduled an intake appointment with an anger management program. At the dispositional hearing, Jessica's counsel indicated that Jessica had a preference for an anger management program rather than one concerned with domestic violence. There is no indication in the record that any incidents of domestic violence had occurred between Jessica and either Richard or Nick.

and had committed himself to abstaining from illegal drug use. Both Jessica's and Nick's counsel expressed concern that the Bureau had not provided their clients with adequate assistance in receiving the services they needed in order to reunify with the children.

As to Emma, Jessica requested through counsel that the court order an "in-home dependency with the nonoffending parent" (i.e., Richard) so that Jessica and Emma could continue to receive services. Both Jessica's and Emma's counsel expressed concern that if the dependency were dismissed, Richard might be reluctant to facilitate visits between Jessica and Emma. As to Conner, Jessica requested that he be returned to her, noting that there was no evidence he had been harmed or neglected while in her care, and that she be provided with family maintenance services.

At the close of the hearing, the juvenile court took the matter under submission until the following afternoon. On December 19, the court entered an order in Emma's case finding that there was clear and convincing evidence that there would be substantial danger to Emma's physical health if she were returned to Jessica's home, and that there were no reasonable means to protect her without removing her from Jessica's physical custody. (§ 361, subd. (c)(1).) Accordingly, the court awarded sole physical custody of Emma to Richard, with joint legal custody to both parents. Jessica was awarded the right to reasonable visitation, with the schedule to be determined by both parents, or by the family law court if they could not agree. The order terminated the dependency proceeding, as well as the juvenile court's jurisdiction over Emma.[6]

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[6] In this regard, the court's signed formal order, which was apparently prepared by the Bureau in advance of the hearing, conflicts with the reporter's transcript of the judge's decision, as announced at the hearing, in which the judge stated that the dependency proceeding would be dismissed as recommended by the disposition report, and any dispute regarding visitation was to be resolved in the family law court rather than the juvenile dependency court. The judge's oral ruling is confirmed by the clerk's minute order, and is consistent with the fact that he did not set a six-month review hearing, as would normally have occurred if the dependency were not dismissed. Both parties have treated the transcript and minute order as controlling, and the dependency proceeding as dismissed. We agree with the parties that the judge's oral ruling and the minute order express the court's actual intent.

In Conner's case, the court's dispositional order also judged him to be a dependent child and found clear and convincing evidence of the need to remove him from Jessica and Nick's home. The court also accepted the reunification plan proposed by the Bureau. Pending reunification, Conner was to remain in the custody of Nick's parents, with twice weekly visitation to be afforded to Jessica, and weekly visitation to Nick. The reunification plan required, among other things, that Jessica and Nick refrain from physical punishment, abstain from using illegal drugs, participate in couples counseling, complete an anger management program, and take a parenting education class. The court set a six-month review hearing for April 16, 2004.

B. Indian Child Welfare Act

The Bureau was informed from a very early stage in the dependency proceedings that both Emma and Conner had Indian ancestry. The children had Cherokee ancestors both on Jessica's side and through their respective fathers, though no specific Cherokee tribe was identified. Emma also had some Sioux and Choctaw ancestry on Richard's side.

A large packet of documents relating to ICWA notice was filed with the juvenile court prior to the dispositional hearing, and is included in the clerk's transcript of Emma's dependency proceeding. The packet includes SOC 318 and SOC 319 forms (see generally *In re S.M.* (2004) 118 Cal.App.4th 1108, 1116, fn. 4; *In re C.D.* (2003) 110 Cal.App.4th 214, 223-226), and other documents, relating not only to Emma but also to Conner. Unfortunately, because the Bureau combined the two sets of notices and related documents when filing them with the court, the state of the record is very unclear as to which documents were sent to which recipients.

It does appear that notices of the dependency proceedings were sent to the Assiniboine and Sioux Tribes of the Fort Peck Reservation in Montana (the Fort Peck Sioux), as well as to the Bureau of Indian Affairs (BIA) in Sacramento. Despite the clear evidence of Cherokee ancestry as to both children, however, no notices were sent to any Cherokee tribe, nor does the record indicate that any notice with respect to Emma was sent to any Choctaw tribe. Curiously, notice appears to have been sent to the Fort Peck

Sioux with respect to Conner as well as Emma, even though there was no indication that Conner had any Sioux ancestry.

The BIA responded to the Bureau's notice with a form letter indicating that the information given was insufficient to permit identification of a federally recognized tribe, particularly inasmuch as there are numerous Sioux tribes and the BIA could not determine which ones might be relevant. The form letter appears to refer only to Emma; it bears Emma's surname, which is not the same as Conner's, and handwritten notes on it refer only to the Sioux and not to the Cherokee.[7] The form letter also states that "Notice to the [BIA] is not a substitute for serving notice on the identified federally recognized tribe . . . ." More importantly, the form letter refers only to the Sioux tribes, and does not mention either Emma's or Conner's possible Cherokee affiliation.

II. DISCUSSION

A. Indian Child Welfare Act

Congress enacted the ICWA in 1978 "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture . . . ." (25 U.S.C. § 1902.) ICWA applies to child custody proceedings, including dependency proceedings resulting in foster care placement or guardianship. (25 U.S.C. § 1903(1)(i).)

The ICWA requires that notice be given to the appropriate Indian tribe in a dependency proceeding when the court knows, or has reason to know, the child is an "Indian child." (25 U.S.C. § 1912(a); see *In re Suzanna L.* (2002) 104 Cal.App.4th 223, 231.) " 'The Indian status of the child need not be certain to invoke the notice requirement. [Citation.]' [Citations.] 'Enrollment is not required . . . to be considered a

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[7] No responses expressly referring to Conner, either from the BIA or from any tribe, are included in the record. This could indicate either that the recipients did not receive notice as to Conner, or that they did not realize they had been sent notices about two children with different paternal ancestry.

member of a tribe; many tribes do not have written rolls. [Citations.] While enrollment can be one means of establishing membership, it is not the only means, nor is it determinative. [Citation.] . . . [S]ection 360.6 codifies the state Legislature's intent that the ICWA applies to children who are eligible for membership in an Indian tribe, even if not enrolled. . . . [R]ule 1439(g)(2) also specifically provides that "[i]nformation that the child is not enrolled in the tribe is not determinative of status as an Indian child." ' [Citation.] Moreover, a child may qualify as an Indian child within the meaning of the ICWA even if neither of the child's parents is enrolled in the tribe. [Citation.]" (*Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 254.)

Notice under the ICWA must be sent to the Indian child's tribe by registered mail with return receipt requested, providing notice of the pending proceedings and of the tribe's right of intervention. (25 U.S.C. § 1912(a); Cal. Rules of Court, rule 1439(f)[8]; see *In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1421.) By federal regulation, such notice must include, if known, the following information: (1) the name, birthplace, and birth date of the Indian child; (2) the name of the tribe in which the Indian child is enrolled or may be eligible for enrollment; (3) all known names and addresses of the Indian child's parents, grandparents, and certain other relatives and custodians, as well as their birth dates, places of birth and death, enrollment numbers, "and/or other identifying information"; and (4) a copy of the petition or other document by which the proceeding was initiated. (25 C.F.R. § 23.11(d) (2004).) The social services agency "has a duty to inquire about and obtain, if possible, all of the information about a child's family history" called for by the SOC 319 form, as well as any additional information called for by the federal regulations. (*In re C.D.*, *supra*, 110 Cal.App.4th at p. 225.)

The notice requirements of the ICWA are mandatory and cannot be waived by the parties. (*In re Suzanna L.*, *supra*, 104 Cal.App.4th at pp. 231-232; *In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1267; *In re Jennifer A.* (2002) 103 Cal.App.4th 692, 706-707; *In re Marinna J.* (2001) 90 Cal.App.4th 731, 733.) Noncompliance with the notice

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[8] All further unspecified rule references are to the California Rules of Court.

requirement can invalidate the actions of the juvenile court, including a dispositional order providing for foster care placement or removal of the child from his or her parents' custody. (25 U.S.C. § 1914.)

In the present case, recognizing that both Emma and Conner might be subject to the ICWA, the Bureau gave notice of the dependency proceedings to the Fort Peck Sioux, as well as the BIA, and filed copies of the notices and delivery receipts with the juvenile court. At the dispositional hearing, the Bureau argued that the notices sent to the BIA "covered" the notice requirement regarding the children's Cherokee and Choctaw heritage, and the trial court found that proper notice had been given. On appeal, Jessica contends that the Bureau's notice to the BIA was not in fact sufficient to fully comply with the notice requirements of the ICWA, and that the Bureau was obligated to give notice to the Cherokee and Choctaw tribes with regard to Emma, and to the Cherokee tribes with regard to Conner.[9]

With respect to Emma, it appears that the Bureau should have given notice to the Cherokee and Choctaw tribes, and possibly also to other Sioux tribes besides the Fort Peck Sioux. Nonetheless, we do not find that reversal of the trial court's orders is required as a result of this issue. "Deficient notice under the ICWA is usually prejudicial [citation][,] but not invariably so. [Citation.]" (*In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1411.) In rare cases, inadequate notice may be harmless. (*Ibid.*)

Emma's case is one of those exceptions. The purpose of the ICWA is to keep Indian children with their families or other Indian custodians. (See generally 25 U.S.C. § 1915.) In this case, Emma was never removed from Richard's custody at any time during the proceedings, and the dispositional order awarded him sole custody of her. Emma's Sioux and Choctaw ancestry derived solely from Richard, and the record indicates that her connection to the Cherokee was stronger through Richard than through

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[9] At one point Jessica indicated to the Bureau that she had some Blackfeet ancestry, but the information reflected on the ICWA notices does not confirm this, and on this appeal Jessica does not contend that the dispositional order should be reversed due to failure to give notice under the ICWA to the Blackfeet tribe.

Jessica. Thus, even if proper notice had been given, and one of the Cherokee, Choctaw, or Sioux tribes had intervened or taken jurisdiction, the preferred result under the ICWA would have been to leave Emma in Richard's custody. (See rule 1439(k)(3).) Since this is exactly what the juvenile court ordered, the outcome of the proceeding would not have changed if all of the relevant tribes had been given proper notice. Any failure to comply with the ICWA with respect to Emma was therefore harmless. (Cf. *In re Antoinette S.*, *supra*, 104 Cal.App.4th at p. 1413; *In re L.B.* (2003) 110 Cal.App.4th 1420, 1426.)

Conner, on the other hand, was removed from the custody of both of his parents. Accordingly, the ICWA clearly required notice of the proceeding to all tribes in which Conner might be eligible to be enrolled. The Bureau acknowledges that notice was not given to any of the Cherokee tribes, but contends that because no specific Cherokee tribe was identified, notice to the BIA was sufficient. Even assuming that notice was in fact given to the BIA with respect to Conner's potential Cherokee ancestry (which, as already noted, is far from clear on the record[10]), we do not agree that this was adequate.

Under the ICWA, notice is to be given to the BIA only if a tribe's identity or location cannot be determined. (25 U.S.C. § 1912(a).) Location of an identified tribe should rarely be difficult. The official addresses of the designated agents for service of ICWA notices of all American Indian tribes are published periodically in the Federal Register. As of the date of the juvenile court proceedings in this case, the most recent listing appears to have been that published on December 20, 2001. (66 Fed. Reg. 65725-01 (Dec. 20, 2001).) It lists names and addresses for designated agents for three

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[10] As already noted, the Bureau filed a single packet of ICWA notice documents relating to both children, which is included in the clerk's transcript of Emma's case only. Moreover, this does not appear to be the only respect in which the Bureau combined the ICWA notices for both children despite their having different fathers. For example, the Bureau sent information about Conner to the Fort Peck Sioux, even though there was no indication he had any connection to that tribe. When two children have different fathers, and each father has Indian ancestry, the tribes that need to be notified as to each child obviously may differ, as may each child's ultimate status under the ICWA. In cases involving half-siblings with differing Indian ancestry, compliance with the ICWA, as well as our review of the record with respect to such compliance, would be facilitated by separate handling of the ICWA notices for each child.

Cherokee tribes. At this writing, the most current version appears to be the one published on December 8, 2003 (68 Fed. Reg. 68408-01 (Dec. 8, 2003)), which also lists designated agents for the same three Cherokee tribes.[11]

As for the identity of the child's tribe, the ICWA defines an "Indian child's tribe" to mean, "in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts." (25 U.S.C. § 1903(5).) Thus, although a child can in fact be a member of, or eligible for membership in, more than one tribe, he or she will be *treated* as having only a single tribe for ICWA purposes. (*In Interest of J.W.* (Iowa Ct.App. 1993) 498 N.W.2d 417, 422, disagreed with on other grounds, *In re Antoinette S.*, *supra*, 104 Cal.App.4th at pp. 1410-1411; see also *In re Edward H*. (2002) 100 Cal.App.4th 1.) Nonetheless, when it appears that a child is, or is eligible to be, a member of more than one tribe, the social services agency in a dependency proceeding must give notice to *each* relevant tribe, until either the tribe waives further notice, or another tribe has been determined to be the one with the most significant contacts. (*In Interest of J.W.*, *supra*, 498 N.W.2d at p. 422.)

In the present case, no determination has ever been made made as to which of the three federally recognized Cherokee tribes has the most significant contacts with Conner, or which, if any, may consider him eligible for enrollment. Pending such a determination, we do not believe it would impose an undue burden on the Bureau to comply with the ICWA by serving all three of the Cherokee tribes listed in the Federal Register. (Cf. *In re Dwayne P.*, *supra*, 103 Cal.App.4th at pp. 252, 257 & fn. 6, 261 [where dependent children had unspecified Cherokee ancestry, court issued writ directing that notice be given to all three federally recognized Cherokee tribes].) Certainly, serving only the BIA and the Fort Peck Sioux (to whom Conner was entirely unrelated) was

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[11] This information is readily available at no charge from an official federal government site on the Internet, http://www.gpoaccess.gov/fr/index.html (as of October 4, 2004), as well as through law libraries and online legal research services.

inadequate.[12] This is particularly so given that the BIA's response referred only to its inability to verify Emma's status as a member of a Sioux tribe, making it uncertain whether the BIA even understood that the Bureau was attempting to ascertain whether Conner belonged to a Cherokee tribe.

Moreover, even if the BIA did understand that it was being asked to verify Conner's relationship with the Cherokee, the information provided by the Bureau for that purpose was inadequate, because the forms it sent did not contain all of the available information regarding Conner's connections with that tribe. (See *In re Gerardo A.* (2004) 119 Cal.App.4th 988, 995 [where social services agency possessed identifying Indian heritage information and shared that information with some but not all of tribes of which dependent child could be member, agency failed to comply fully with ICWA]; *In re C.D.*, *supra*, 110 Cal.App.4th at p. 227; *In re Edward H.*, *supra*, 100 Cal.App.4th at p. 6; *In re Louis S.* (2004) 117 Cal.App.4th 622, 632-633.) The forms were replete with notations that items of information regarding Conner's Indian ancestry were unknown, even though some of the missing information clearly was readily available to the Bureau. For example, Conner's paternal grandmother's (Nick's mother's) Social Security number and address were not listed on the form, even though Conner was placed with her and she was present in court during portions of the proceedings. The ICWA requires social services agencies to investigate in order to ascertain all the information that may be available regarding a child's Indian ancestry. (*In re S.M.*, *supra*, 118 Cal.App.4th at pp. 1116-1117; *In re C.D.*, *supra*, 110 Cal.App.4th at p. 225.) The record in this case does not reflect that such an investigation was performed with reasonable diligence.

Accordingly, even if notice to the BIA were an adequate substitute for notice to all three Cherokee tribes when the specific tribe of a possibly Cherokee child is unknown, the notice given in this case was still inadequate. It did not provide available information that might have enabled the BIA to identify the Cherokee tribe involved. (Cf. *In re C.D.*,

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[12] Indeed, the BIA itself informed the Bureau, in response to the notice it received, that notice to the BIA is *not* a substitute for notice directly to the relevant tribes.

supra, 110 Cal.App.4th at p. 227 [where specific Cherokee tribe to which child was related was not identified, and social services agency gave notice containing all relevant information concerning child's ancestry to BIA and three Cherokee tribes (including two out of the three federally recognized ones), notice was sufficient under ICWA; however, notice to all three federally recognized Cherokee tribes would have been "optimal"].)

On remand, the juvenile court should ensure that proper ICWA notice regarding the dependency proceedings for Conner has been given to all three federally recognized Cherokee tribes. To the extent that Conner's relatives may possess additional information about his Indian ancestry, this new information is also required to be served on all pertinent tribes. As was recently observed in *In re Gerardo A.*, *supra*, 119 Cal.App.4th at p. 995, "The opportunity for a tribe or the BIA to investigate [whether a child is eligible for tribal membership] means little if the department does not provide the available Indian heritage information it possesses." (See also *In re Louis S.*, *supra*, 117 Cal.App.4th at p. 631.)

In closing, we recognize that timeliness is of vital importance in juvenile dependency matters because delay usually does not serve a child's interests. (See *In re Emily L.* (1989) 212 Cal.App.3d 734, 743.) However, we cannot disregard the potential adverse impact from the deficient notice provided in this case given the fact that noncompliance with the notice requirement can invalidate the actions of the juvenile court, including an order approving a foster care placement for the child. (25 U.S.C. § 1914 [tribe may petition to invalidate action on showing of violation of notice requirements]; *In re Desiree F.* (2000) 83 Cal.App.4th 460, 475 [trial court orders invalidated at the request of the tribe because notice had not been given in compliance with ICWA]; rule 1439(n)(2) [final decree of adoption may be set aside for noncompliance with ICWA].) Consequently, we agree with those courts that have emphasized the importance of strict compliance with ICWA notice requirements and, if necessary, have remanded the matter for the juvenile court to ensure that proper notice is given. (*In re Karla C.* (2003) 113 Cal.App.4th 166, 178-179; *In re Nikki R.* (2003) 106 Cal.App.4th 844, 855-856; *In re H. A.* (2002) 103 Cal.App.4th 1206, 1214.)

B. Sufficiency of the Evidence

" 'We begin by noting that in dependency proceedings the burden of proof is substantially greater at the dispositional phase than it is at the jurisdictional phase if the minor is to be removed from his or her home. [Citations.] [¶] This heightened burden of proof is appropriate in light of the constitutionally protected rights of parents to the care, custody and management of the children. [Citation.] [¶] " 'Parenting is a fundamental right, and accordingly, is disturbed only in extreme cases of persons acting in a fashion incompatible with parenthood.' [Citation.] 'In furtherance of these principles, the courts have imposed a standard of *clear and convincing* proof of parental inability to provide proper care for the child and resulting detriment to the child if it remains with the parent, before custody can be awarded to a nonparent.' [Citation.]" [Citation.]' [Citation.]" (*In re Isayah C.* (2004) 118 Cal.App.4th 684, 694, italics in original quoted source.)

Before the court may order a minor physically removed from his or her parent, it must find, by clear and convincing evidence, that the minor would be at substantial risk of harm if returned home and there are no reasonable means by which the minor can be protected without removal. (§ 361, subd. (c)(1).) A removal order is proper if it is based on proof of parental inability to provide proper care for the minor and proof of a potential detriment to the minor if he or she remains with the parent. (*In re Jeannette S.* (1979) 94 Cal.App.3d 52, 60.) The parent need not be dangerous and the minor need not have been actually harmed before removal is appropriate. The focus of the statute is on averting harm to the child. (*In re Jamie M.* (1982) 134 Cal.App.3d 530, 536.)

We review the record in the light most favorable to the trial court's order to determine whether there is substantial evidence from which a reasonable trier of fact could make the necessary findings *based on the clear and convincing evidence standard*. (*In re Luke M.* (2003) 107 Cal.App.4th 1412, 1426.) Clear and convincing evidence requires a high probability, such that the evidence is so clear as to leave no substantial doubt. (*Ibid.*) We must also abide by the established rule that "[t]he juvenile court has broad discretion to decide what means will best serve the child's interest and to fashion a dispositional order accordingly. [Citation.] Its determination will not be reversed absent

a clear abuse of that discretion. [Citation.]" (*In re Corey A.* (1991) 227 Cal.App.3d 339, 346.)

1. Emma

With respect to Emma, after reviewing the record in accordance with the above standards, we find the evidence sufficient to justify the trial court's dispositional order. Admittedly, the abuse that led to Emma's detention consisted only of a single incident that did not result in lasting or serious physical injury. Nonetheless, the record contains substantial evidence to support the court's conclusion that clear and convincing evidence showed a need to remove Emma from Jessica's home. Emma was physically abused while in Jessica's custody, and Jessica admittedly had a substance abuse problem for which she had not yet been successfully treated. Jessica had not responded adequately to the efforts that the Bureau had made to mitigate the situation that led to Emma's initial detention. Under the circumstances, the juvenile court did not err in finding clear and convincing evidence justifying removing Emma from Jessica's home and granting physical custody to her father, who cared for her appropriately.

The gist of Jessica's argument on appeal is that by the time of the dispositional hearing, she had started to participate in treatment for the problems that had led to Emma's removal. The trial court evidently deemed her efforts to have been too little, and too late, to overcome the clear and convincing evidence that Emma's protection required her removal from Jessica's home. On the record before us, there is substantial evidence to support this conclusion.

Jessica also argues on appeal that the trial court erred in ordering as part of the reunification plan that she keep Emma away from Nick. Jessica has not provided a citation to the record supporting the existence of any such order, and our review of the record has not disclosed it. There is a reference to such a requirement in the Bureau's October "Case Plan," under the "Service Objectives" for Jessica, but no such language is contained in the "Recommendations" section of the October disposition report, much less in the trial court's dispositional order adopting those recommendations. In light of the trial court's dismissal of the dependency proceeding as to Emma, we do not understand

the trial court to have issued any such order. Accordingly, we need not address Jessica's arguments that it was inappropriate.

2. Conner

Having determined that the Bureau did not adequately comply with the ICWA as to Conner, we must reverse the juvenile court's dispositional order on that basis, and remand with directions that the Bureau give proper notice under the ICWA as discussed in this opinion. Upon remand, if proper ICWA notice results in a determination that Conner is an Indian child within the meaning of the ICWA, then the juvenile court must conduct a new dispositional hearing under the provisions of the ICWA, section 360.6, and rule 1439. (See, e.g., *In re Samuel P.*, *supra*, 99 Cal.App.4th at p. 1267 [when child may be an Indian child, ICWA provides heightened standards for out-of-home placement].) Accordingly, if Conner is an Indian child, Jessica's sufficiency of the evidence argument, and her issues with respect to the reunification plan for him, will be moot.

Nonetheless, because Conner may be determined not to be an Indian child even after proper notice, we address Jessica's other issues on their merits for the guidance of the juvenile court. With regard to the question whether substantial evidence supports the trial court's removal order, Conner's case is closer than Emma's, because he did not personally suffer any abuse and concededly was well cared for while living with Jessica and Nick. On balance, however, and given the applicable standard of review, we cannot say that the trial court's order was not warranted by clear and convincing evidence of a need to remove Conner from the care of two parents who, at the time of the dispositional hearing, continued to test positive for a controlled substance, and had not yet fully addressed the other issues identified by the Bureau.

Jessica also argues that there was insufficient evidence to support the trial court's order adopting the Bureau's recommendation that Jessica and Nick's reunification plan in Conner's case include a requirement that they attend couples counseling. As the Bureau points out, however, Jessica did not raise an objection to this requirement during the proceedings below. This is not one of those rare cases in which we should exercise our

discretion to address an issue even though it was not raised in the dependency court. (See *In re S.B.* (2004) 32 Cal.4th 1287, 1292-1294.) We therefore decline to do so.

III. DISPOSITION

With respect to Emma, the juvenile court's dispositional order is affirmed. With respect to Conner, the juvenile court's dispositional order is reversed, and we remand to the juvenile court with directions to ensure that the Bureau gives adequate notice of Conner's dependency proceeding to the Cherokee tribes, as required by the ICWA, before proceeding further. If proper ICWA notice results in a determination that Conner is an Indian child within the meaning of the ICWA, then the juvenile court shall conduct a new dispositional hearing. If not, the juvenile court shall reinstate its dispositional order as to Conner.[13]

_____
Ruvolo, J.

We concur:

_____
Kline, P.J.

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Lambden, J.

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[13] We are not, of course, privy to any factual and/or procedural developments in Conner's case that may have occurred during the pendency of this appeal. Our direction that the trial court's December 2003 dispositional order be reinstated if Conner is determined not to be an Indian child should not be read to mean that any subsequent order in effect at the time of such reinstatement would be undermined in any way.